No. 87.

Office Supreme Court U.S.
FILED
NOV 12 1902
JAMES H. McKENNEY,
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1103

Br. of Hubbell, McIntosh & McKenney for D.E.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed Nov. 12, 1902.

No. 87.

JANE JOHNSON, PLAINTIFF IN ERROR,

vs.

THE NEW YORK LIFE INSURANCE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF OF ARGUMENT FOR DEFENDANT IN ERROR ON THE MERITS.

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JAMES H. McINTOSH,
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For Defendant in Error.

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JANE JOHNSON, PLAINTIFF IN ERROR,

vs.

NEW YORK LIFE INSURANCE COMPANY,
DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR ON THE MERITS.

The defendant in error has heretofore filed a motion to dismiss this writ of error for want of jurisdiction. If, after considering said motion and the argument supporting it, the court should conclude the same are not well founded, we would then ask consideration of this brief on the merits of the case.

STATEMENT OF THE CASE.

The plaintiff in error's statement of the case omits so much we deem material to the issues here that we feel we must more fully state the facts.

are briefly stated at pages 5, 6, and 7 of our brief in support of our motion to dismiss, and need not here be more fully stated.

The Facts in the Case.

THE APPLICATION FOR THE POLICY.

On December 18, 1890, Frank C. Johnson, at Randolph, Iowa, applied in writing to the New York Life Insurance Company for a policy on his life in the sum of $25,000 (p. 35). The application was made to E. C. Smith, the company's soliciting agent at Council Bluffs, Iowa (p. 7). At the time of the application and thereafter Johnson resided at Randolph, Iowa, and Omaha, Nebraska (p. 35), having, however, removed his family from Randolph to Omaha in 1889 (p. 68); but he owned and conducted a bank in Randolph for a long time prior to the removal of his family from there to Omaha, down to September, 1895 (p. 68).

This application contained agreements for a surrender value in paid-up insurance, in consideration of which the applicant agreed to "waive, in case of lapse or forfeiture, all right to any other surrender value provided for by the statute of any State or country," and specifically to waive the provisions of chapter 347 of the Laws of 1879 of the State of New York.

The application further contained this provision:

"That the contract contained in such policy and in this application shall be construed according to the law of the State of New York, the place of said contract being agreed to be the home office of said company in the city of New York."

The company duly accepted this application, and on January 15, 1891 (p. 56), delivered to Johnson, in the State of Iowa, at Council Bluffs, through its soliciting agent there, E. C. Smith, a life-insurance policy for $25,000, conditioned upon the annual payment, November 11 each year, of a premium of $1,060 (p. 2).

The Policy.

That part of said policy material to this suit was in words and figures as follows:

"Number 385,048. Amount, $25,000.

"The New York Life Insurance Company, by this Policy of Insurance,

Age, 44.
Annual premium,
$1,060.00

Notice—In consideration of the stipulations in case of lapse specified in the policy, the provisions of chap. 347 of the Laws of 1879 of the State of New York have been waived in the application for this policy.

"In consideration of the agreements, statements, representations, and warranties submitted to its officers at the home office, in the city of New York, in the written application for this policy, which are hereby referred to and made a part of this contract, and in further consideration of the sum of fourteen hundred and fifty-five dollars and — cents, to them in hand paid, at the office of the company in the city of New York (being the premium for two years' term insurance), and of the annual payment of one thousand and sixty dollars and — cents (being the life premium), to be paid at said office on or before the eleventh day of November, in every year during the continuance of this policy, commencing on the 11th day of November, 1892,

"Doth insure the life of Frank C. Johnson (banking) of Randolph, in the county of Fremont, State of Iowa, (hereinafter called the insured), in the amount of twenty-five thousand dollars, commencing on the eleventh day of November, 1890, at noon.

* * * * * * *

"This policy is issued and accepted upon the following express conditions and agreements.

* * * * * * *

"Second. That if any one of the premiums is not paid as hereinafter provided, on or before the day when due, then this policy shall become void, and all payments previously made shall remain the property of the company, except that if this policy shall lapse, or become forfeited for the non-payment of any premium, after there have been paid thereon three full premiums, as above specified (that is to say, the premium for four years' of insurance) a paid-up policy will be issued, on demand made within six months after such lapse, with surrender of this policy, under the same conditions as this policy, except as to payment of premiums, but without participation in profits (and without mortuary dividend) for such an amount as the net reserve on this policy at the time of lapse computed by the American Table of Mortality, and interest at four and one-half per cent., after deducting all indebtedness to the company, will purchase as a single premium, at the present published rates of the company, at the age of the insured, at the time of lapse; and all right to any other paid-up policy or surrender value, provided for by the statute of any State or country, is hereby waived.

* * * * * * *

Risks not assumed. "This policy does not insure against death occurring while engaged in military or naval service in time of war or in consequence of such service, nor against death in consequence of a duel or violation of law. In any such case the policy shall be null and void; but on its surrender within six months thereafter, with satisfactory proofs of death, the net reserve (computed by the American Table of Mortality and interest at four and one-half per cent.), after deducting all indebtedness to the company, will be paid therefor.

* * * * * * *

Payment of premiums. "All premiums are due and payable at the home office of the company unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president,

vice-president or actuary, and countersigned by such agents. Notice that each and every payment of premium is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is hereby expressly waived. The giving of any other notice, or the acceptance of any premium after it is due, is to be considered as an act of courtesy only, and shall not be deemed as establishing a custom or as waiving or disturbing any of the conditions as to payment of premiums thereafter due."

Notice when due.

PREMIUM PAYMENTS AND THE CONVERSION OF THE POLICY INTO AN ACCUMULATION POLICY.

Johnson duly paid to the company's soliciting agent, E. C. Smith, at Council Bluffs, Iowa (p. 59), the first payment named in the policy, being the premium for two years' term insurance; and also, at the same place, duly paid the annual premium that matured November 11, 1892; but he never thereafter made, nor offered to make, any other or further premium payment on this policy (p. 57).

December 10, 1892, Johnson, at Omaha, Nebraska, through the company's agent there, made application to the defendant in writing as follows (pp. 58, 56, and 16):

"OMAHA, NEB., *Dec. 10th*, 1892.

"The New York Life Insurance Co. is hereby requested to extend the benefits of its accumulation policy to policy No. 385,048, issued by the said company on the life F. C. Johnson, with the understanding, that, except as modified by such benefits, said policy shall remain unchanged.

"F. C. JOHNSON,
"*Beneficiary Insured.*

"E. C. SMITH, *Witness.*"

This application for the extension of the benefits of defendant's accumulation policy to Johnson's policy was duly received by the defendant at its home office, was accepted by it, and under date of January 20, 1893, the defendant

issued and delivered to Johnson, at Omaha (p. 72), a certificate, duly certifying that the benefits of its accumulation policy plan had been extended to his policy (p. 57). This certificate was among the papers turned over to the plaintiff at the time she claims he assigned to her the policy in question, in November, 1895 (pp. 34, 66, 67); and at the trial of this case plaintiff, upon demand, produced the certificate, and the defendant put it in evidence (p. 88).

The special benefits thus extended to Johnson's policy, as shown by this accumulation certificate, were numerous, and widely changed the policy from what it was as originally written. The changes especially material to the present issue were as follows (p. 16):

"NEW YORK LIFE INSURANCE COMPANY, 346 BROADWAY, NEW YORK.

"This certifies that in compliance with the request of the legal holders of policy No. 385,048, issued on the life of Frank C. Johnson, the benefits of the accumulation policy plan of the New York Life Insurance Company are hereby extended to said policy, as stated on the next page.

"It is understood and agreed that, except as herein expressly modified, the terms of said policy No. 385,048 remain unchanged.

* * * * * * *

Incontestability. "This policy is not subject to any conditions or restrictions as to travel, residence, occupation, or manner of death.

"After this policy shall have been in force three full years,

Non-forfeiture. in case of non-payment of any premium subsequently due, and upon the payment within thirty days thereafter of any indebtedness to the company on account of this policy: (1) the insurance will be extended for the face amount, as provided in the table below; or (2) on demand made within six months after such non-payment of premium due, with surrender of this policy, paid-up insurance will be issued for the reduced amount provided in said table; or (3) the policy will be reinstated within the said six months, upon pay-

ment of the overdue premium with interest at the rate of five per cent. per annum, if the insured is shown to the company to be in good health, by a letter from a physician in good standing.

"TABLE OF GUARANTEES IF PAYMENT OF PREMIUMS IS DISCONTINUED,

"Provided there is no indebtedness against the policy.

("Pursuant to the insurance law, chapter 690, Laws of 1892 of the State of New York.)

If the premiums are paid.	(1) The insurance of $25,000 will be extended	or (2) The policy may be converted into paid-up insurance
To Nov. 11, 1893,	to May 11, 1896,	of $1,825
" " " 1894,	" Jan. " 1899,	" 3,045
" " " 1895,	" Aug. " 1901,	" 4,225
" " " 1896,	" do. " 1903,	" 5,250
" " " 1897,	" do. " 1905,	" 6,175
" " " 1898,	" May " 1907,	" 7,125
" " " 1899,	" Feb'y " 1909,	" 8,075
" " " 1900,	" Aug. " 1910,	" 9,000
" " " 1901,	" Jan. " 1912,	" 9,750
" " " 1902,	" May " 1913,	" 10,500
" " " 1903,	" June " 1914,	" 11,175
" " " 1904,	" July " 1915,	" 11,825
" " " 1905,	" July " 1916,	" 12,400
" " " 1906,	" June " 1917,	" 12,900
" " " 1907,	" M'ch " 1918,	" 13,250
" " " 1908,	" Nov. " 1918,	" 13,700
" " " 1909,	" July " 1919,	" 14,025

"Policies continued in force beyond the accumulation period will be entitled, in case of non-payment of any premium subsequently due, to extended insurance or reduced paid-up insurance, on the same basis as that on which the above table is constructed."

In considering this policy, as changed by the accumulation benefits evidenced by the foregoing certificate,

It is Important to Note

1. That Johnson applied for the benefits of the defendant's accumulation policy on December 10, 1892 (pp. 7, 16), being the last day upon which he might pay, and probably the day upon which he did pay, the premium that matured November 11, 1892 (p. 4).

2. That it was upon Johnson's own written request, made December 10, 1892, and within the limit of the one month's grace for the payment of the November, 1892, premium, that his ordinary forfeitable annual policy on his life was converted into this non-forfeitable accumulation policy.

3. That this accumulation policy was materially different from and more valuable to the insured than the insured's original policy.

4. That the provisions in the original policy making it void for non-payment of premium were annulled by that stipulation of the accumulation policy which provided that for each premium payment the insurance of $25,000 would be extended to a specific date years beyond the time to which the payment would have carried it, if the policy had remained as originally issued, a forfeitable policy.

5. That the November 11, 1892, premium was the last premium Johnson paid, and that by it, under the terms of the accumulation policy, his life became insured for $25,000 for a term that ended May 11, 1896.

6. That in the accumulation policy the annual payment of the premium continued to be the consideration necessary to be paid for an extension of the insurance from term to term, but a failure to pay the annual premium did not under the accumulation policy render the insurance void

or voidable, as in the original policy, but, on the contrary, extended the insurance for the full face of the policy to a specific date, and gave the insured the full benefit of all the insurance the money he paid would buy.

JOHNSON'S DEATH AND THE COMMENCEMENT OF THIS SUITS

Johnson died September 28, 1896, more than four month. after his insurance term had expired.

February 20, 1897, the plaintiff tendered the defendant $3,615, being the annual premiums on this policy, commencing with the premium due November 11, 1893, with interest. The company refused the tender. Thereafter, and on November 19, 1897, the plaintiff commenced this suit.

THE GROUND UPON WHICH THE PLAINTIFF SEEKS TO RECOVER.

The plaintiff brought this action on the original policy, not on the accumulation policy. The accumulation policy the plaintiff ignored, leaving it to the defendant to aver and prove the exact nature and extent of the contractual relations between these parties.

The plaintiff did not claim that any payment was ever made, or offered to be made, of any premium on this policy after the premium that became due November 11, 1892, but admitted that no premium was thereafter ever paid.

The plaintiff did not claim that Johnson died within the period of his extended insurance, but averred that he died September 28, 1896, three years, ten months, and eighteen days after he paid the last premium that he paid, and four months and thirteen days after the term of his extended insurance had expired.

Bringing this suit on the original policy, the plaintiff claimed that the policy was still in force when Johnson

died; that although the original policy, by its terms, was forfeitable for non-payment of premium, it could not, in fact, be forfeited by the company, until the company first showed that, in compliance with the 1877 statute of New York in respect of life-insurance policies forfeitable for non-payment of premium, in force when the original policy was taken out, it mailed to the insured at his last known post-office address, at least thirty and not more than sixty days prior to the day when the premium was payable, a notice stating the amount of such premium, the place where it should be paid, and that unless such premium should be paid within thirty days after the mailing of such notice the policy and all payments thereon would become forfeited and void.

The defendant in error claims:

First. That the Iowa court gave full faith, credit, and effect to the New York laws.

Second. That the Iowa court, in its application of the New York laws and in its construction of this policy, was right in holding that the law, requiring notice "only when it is sought to declare the contract forfeited," was not applicable to this policy, because by failure to pay the annual premium the policy could not thereby become either void or voidable, forfeited or forfeitable, but stood as insurance for a specific term, which expired before Johnson died.

Third. That Johnson abandoned his insurance contract, except as the policy continued in force until May 11, 1896, as a policy of term insurance.

Fourth. That if it were necessary to notify the insured that upon failure to pay the premium when due his policy would be forfeited and void, when, as everybody knew, it would not and could not be so forfeited, then, as matter of fact and as an agreed courtesy, notice was duly sent.

BRIEF OF THE ARGUMENT.

First Point.

The Iowa court gave full faith, credit, and effect to the New York laws.

For our argument on this point we beg to refer to our brief in support of our motion to dismiss this writ of error for want of jurisdiction.

An inspection of the opinion of the Iowa court, found in the record at page 99, discloses not merely that the Iowa court in its decision gave full faith and credit to the New York laws, but also that it fully and carefully considered those laws and all claims the plaintiff made for them, and as a result arrived at the conclusion that the plaintiff had no right of recovery because such laws did not apply to this policy.

If the Iowa court was wrong, it was wrong, not because it failed to give full faith, credit, and effect to the New York laws, but because it erred in applying the New York laws and in construing this policy. As the opinion shows, that court gave its entire consideration of the case, first, to the meaning, scope, and intent of the New York laws; secondly, to the real nature and character of this contract, its duration and its limitations; and then, applying the New York laws as it understood them to this policy as it construed it, concluded that "the notice is required only when it is sought to declare the contract forfeited or lapsed," and therefore, that the law did not apply to "a policy for a term that expired before Johnson's death." Even if this were error, still this court will not take jurisdiction to correct the error.

Glenn *vs.* Garth, 147 U. S., 360.

Lloyd *vs.* Matthews, 155 U. S., 222.

Banholzer *vs.* New York Life Ins. Co., 178 U. S., 402.

Second Point.

The Iowa court in its application of the New York laws and in its construction of this policy was right in holding that the law requiring notice "only where it is sought to declare the contract forfeited" was not applicable to this policy, because by failure to pay the annual premium the policy could not thereby become either void or voidable, forfeited or forfeitable, but stood as insurance for a specific term, which expired before Johnson died.

1. The plaintiff bases her claim on the New York notice law of 1877, section 1 of which is printed at page 2 of the plaintiff's brief. The plaintiff, however, omits to print section 2 of this law, which is as follows:

"Sec. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company, in pursuance of said section, shall be presumptive evidence of such notice having been given" (pp. 10, 58).

2. The Iowa court understood this law to apply to policies that the company had "power to declare forfeited or lapsed." It did not believe the New York legislature intended to require life insurance companies to send each holder of a non-forfeitable policy a threatening notice, therein falsely stating "that unless the premium or interest then due shall be paid to the company or to a duly appointed agent or other person authorized to collect said premium within thirty days after the mailing of said notice the said policy and all payments thereon shall become forfeited and void."

Why require the company to send to the policy-holder a notice stating that if his premium is not paid when due "the policy and all payments thereon will become forfeited and

void" if this is not, and cannot be made, true? Why require the company to threaten to forfeit a policy that the company has agreed shall be non-forfeitable? Why require the company to say that its contract shall become forfeited and void, when the company not only knows it will not, but knows it cannot, and also intends to stand by its agreement as made, recognizing it and abiding by it until the end of the insurance term named in the contract?

The only reasonable answer to these inquiries is the answer the Iowa court gave,—the New York law made no such requirement. The New York law applied only to policies that were forfeitable, and by the forfeiture of which the company usually made a profit and the insured suffered loss, and not to policies that could not be forfeited, but that at any and all events remained in force to give the insured every hour of insurance the money he had paid would buy.

3. Johnson's original policy was forfeitable for the non-payment of premium, but when, on his application, it was changed into the defendant's accumulation policy contract, then it became a policy which gave insurance for the specific term in consideration for each premium paid.

The orginal policy provided (p. 2) that "if any one of the premiums is not paid as hereinafter provided on or before the day when due, then this policy shall become void, and all payments previously made shall remain the property of the company." Thus, in its original form, it was of the class of policies to which the New York notice law referred by requiring the notice to advise the insured that "the policy and all payments thereon will become forfeited and void," if the premium is not paid when due.

But when Johnson, on the 10th of December, 1892, applied to the company to have his policy converted into an accumulation policy, his contract with the defendant then was that, if he elected to make no further premium payments on it, the policy should not become void, but the in-

surance of $25,000 would continue in force until May 11, 1896; and if he should pay the next premium, and then chose to make no further premium payment on it, his contract should not become void, but the insurance of $25,000 should be extended to January 11, 1899. And so on, according to the table of benefits, each payment extending his insurance to a stated period, his policy not becoming void, but continuing the insurance for its full face until the end of the term designated in the table of benefits.

These provisions for extension of the insurance were expressed in the policy under the heading "Non-forfeiture."

4. Can it be said, then, that the condition in the original policy by which the policy was to become void for the non-payment of any premium when due had any meaning, force, or effect, after this original contract between the parties was so changed by them as that each premium payment purchased insurance, not for a year merely, but for different, specified periods of time, amounting at the time of the change in the contract to two years and a half? Surely not. The accumulation certificate expressly modified the original policy in a variety of its features. This annulment of the forfeiture clause of the original policy was one of the most important modifications it made.

The policy, as modified by the accumulation certificate, was, then, precisely what the parties to it agreed it should be. It was what on its face it purported to be. It was a non-forfeitable policy. For each payment of premium Johnson's life thereby became insured to a specific date. The policy stood as insurance on his life until that date, and could not be forfeited or avoided by any act or omission of either party before the term expired to which the insurance was extended by virtue of the premiums paid.

And this suggests one of the special errors responsible for the plaintiff's persistency in this case. At page 23 of the plaintiff's brief it is said, "the company says it will not now

pay this loss because Johnson failed to pay the premium which fell due November 11, 1893." This is not what the company says at all. What the company says is, that it will not pay this demand because the insurance on Johnson's life expired May 11, 1896, and Johnson did not die until after that. To be sure, if Johnson had paid the premium that fell due November 11, 1893, the company would have promptly paid the amount of the insurance, because the term of his policy would then have been extended to January 11, 1899, and the insurance would have been in force at the time of his death. But if I fail to renew the insurance on my house that runs to January 1, 1903, and my house burns down February 1, 1903, do I have a claim on the company? Of course I do not, because my insurance expired before my loss. So it was with Johnson. He had insurance down to May 11, 1896, but the term expired before the loss occurred. He lived until September 28, 1896.

5. Of no sort of contract other than an insurance contract, against no party to a contract other than an insurance company, would it ever be seriously urged that a provision in a contract by which it was agreed that it would become void if one of the parties to it should fail to perform a condition subsequent continued to be a part of the contract, or that the contract was any longer a forfeitable contract, if by a subsequent modification of it the parties agreed that a failure to perform that condition subsequent should leave the contract in force and extend the period of its duration to a distant subsequent date.

Why make this exception of an insurance contract and against an insurance company? To be sure, an insurance contract is usually made on the company's own form, which is sometimes voluminous and may be overstrict in its terms. In such cases it is fair and right, in the interests of justice and fair dealing, to construe the policy, in case of doubt, most strongly against the company.

But does this rule obtain in respect of a policy such as this, that is definite and clear in its terms, that is conditioned at any and all events to give to the insured the full worth of his money, every hour and every dollar of insurance that he ever paid for, and in favor of one who for more than three years never paid nor offered to pay any sum whatever on his insurance contract, and of whom it is not now nor ever has been claimed that he desired or intended or was willing to pay another dollar?

The clause of this accumulation policy by which it is provided that "if the premiums are paid to November 11, 1893, the insurance of $25,000 will be extended to May 11, 1896," is certainly very clear and unambiguous. Whatever, therefore, the rule may be as to the construction of doubtful terms in a policy, the contract, where its meaning is clear and unambiguous, is to be construed by the same rules of construction as apply to other instruments. "Its language is to receive a reasonable interpretation. Its intent and substance as derived from the language used should be regarded. In such cases, as in all others, the subject of the insurance, its nature and extent, are to be ascertained from the words of the contract which the parties have made."

Imperial Ins. Co. *vs.* Coos County, 151 U. S., 452.
Dwight *vs.* Life Ins. Co., 103 N. Y., 431.
Lewis *vs.* United States, 92 U. S., 618.
Brady *vs.* Cassedy, 104 N. Y., 147.
Powell *vs.* Life Association, 50 Vt., 630.
Universal Life Ins. Co. *vs.* Devore, 14 S. E., 532 (Va., Feb., 1892), and numerous cases therein cited.

Therefore the learned trial judge was strictly within the limits of established rules for the construction of contracts of this kind when, in construing this policy in the light of the situation of the parties to it, he said (p. 78):

"But neither the insurance laws, nor the provisions of the policy, ought to be so construed as to make it an inducement

to parties not to pay their premiums, and to require parties, who in good faith continue to pay their premiums and keep up their policies, to make up the loss which is sustained by reason of the willful default of persons who deliberately conclude not to abide by the conditions of the policy. The default in this case was not a mere accidental one. There is no evidence that it resulted from any failure of notice. There is nothing in the situation of the plaintiff's intestate, as it seems to me, to recommend him to the special consideration of the court. His premium fell due on the 11th of November, 1893. For nearly three years thereafter he failed to pay his premium or to make any offer of the same, or to do anything which evinced his desire or intention or his wish to keep this policy in force. For this court now to hold that the plaintiff should be paid this insurance, would be, in my judgment, simply throwing an unwarranted burden upon parties who have complied with their contracts, and putting a premium or a special privilege upon the failure of the insured to comply with the agreement upon his part."

6. From the plaintiff's argument, it necessarily follows that a policy of term insurance really could not be written by a New York company; for the plaintiff insists, that to make this policy a policy for a term the insured must first be put in default, which could only be done by sending the notice.

(*a.*) This view ignores the plain terms of the policy. The policy does not say that if the insured shall be put in default so as to entitle the company to forfeit the policy, then the insurance of $25,000 will be extended to May 11, 1896. The policy says, "if the premiums are paid to November 11, 1896, the insurance of $25,000 will be extended to May 11, 1896."

By the plain terms of the policy, therefore, the extended insurance became operative when the premiums were paid to November 11, 1893, without any notice whatever or other act of any kind by either party.

(*b.*) Notwithstanding the terms of the policy, the plaintiff argues that this notice law was a part of it, because the New York court in construing the policy in the Baxter case, which provided that "this policy shall be void if any premium or part of a premium be not paid when due," and in applying this notice law to it, declared "that this statute was a part of the contract in question and covered by the rights and obligations of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

In answer to this, we do not deny that the laws of a State where a contract is made may become a part of the contract. We insist, however, that this rule only applies where the contract is of the very kind as well as class to which the law relates. For instance, in every State are special laws relating to negotiable paper. Does it follow from this that the laws of each State relating to negotiable paper become a part of every contract made therein promising to pay money?

And so, when it is insisted that the New York notice law, because it was applicable to the policy in controversy in the case of Baxter *vs.* Brooklyn Life Insurance Co., 119 N. Y., 450, is therefore applicable to this policy, it must be borne in mind that the Baxter policy was to become void if the premiums were not paid when due, whereas this policy, upon the insured's application, was converted into a non-forfeitable policy, insuring for a specific term; that the question before the court in the Baxter case related to the construction of the notice law, whereas in this case it relates to the construction of this policy and to the application of that law; that in the Baxter case the only point before the court was as to whether non-payment of premium was a complete defense to a forfeitable policy, without also proving the sending of the notice, whereas in this case the defense was that the policy had expired, not that it had been forfeited. Hence, that the notice law may have been appli-

cable to the policy in controversy in the Baxter case is no better reason why it should therefore be applicable to this policy than the fact that a law relating to negotiable paper must on that account apply to another and different form of contract for the payment of money.

The Iowa court, therefore, in its construction of this policy, was right in holding that is was a policy for a term, and that when the term expired for which the risk was taken there was neither a forfeiture nor a lapse. For the accumulation policy annulled that part of the original policy by which it was provided that in case of non-payment of premium it should become void. The accumulation benefits converted the policy into a non-forfeitable policy, which, in case of non-payment of premium, became neither void nor voidable, forfeited nor forfeitable, but which thereafter stood as insurance for a specific term that had expired before Johnson died. And there is no escaping this plain and necessary construction of the contract either by generalizations of any kind, or by ignoring the real engagements of the parties, or by confusing this contract with the decisions of the New York courts construing other contracts substantially unlike it. The nature and extent of the rights and engagements of the parties to this agreement clearly and unmistakably appear by the language they have used in it, and it all shows that when Johnson died his policy had long before expired.

Third Point.

Johnson abandoned his insurance contract, except as the policy continued in force until May 11, 1896, as a policy of term insurance.

1. Johnson must have known when his premium became due. The insurance contract fixed that, and he was a party to it. Besides, he expressly agreed in the policy by it to take "notice that each and every payment of premium is

due at the date named in the policy." He paid the 1892 premium when due (p. 25). Besides, the 11th of November is a date which he must particularly have had in mind, because, although applying for the policy December 18, he requested in his application to have the insurance contract made as of the 11th of November (p. 37). He did this to give himself the benefit of the premium rate applicable to age forty-four, for he was born May 12, 1846 (p. 35). By taking the policy out November 11 he would have the benefits of the premium upon a policy taken out by a man of forty-four years of age instead of forty-five.

Again, this policy came particularly to his attention in November, 1895, for, on the 15th day of that month, he executed an assignment of the policy to his wife (p. 34), so that the failure to pay premiums after 1892 could not have been accidental or a mere inadvertence.

2. Moreover, the trial court practically found that Johnson had abandoned his policy; for in the court's opinion sustaining the defendant's motion for an instruction the trial court said (p. 78):

"The default in this case was not a mere accidental one. There is no evidence that it resulted from any failure of notice. There is nothing in the situation of the plaintiff's intestate, as it seems to me, to commend him to the special consideration of the court. His premium fell due on the 11th day of November, 1893. For nearly three years thereafter he failed to pay his premium or to make any offer of the same, or to do anything which evinced his desire or his intention or his wish to keep this policy in force."

If the point now under discussion is one proper to be considered by this court upon this writ of error, then, we submit, the above finding is conclusive on the question of the insured's abandonment of his policy.

Ashley *vs.* Ryan, 153 U. S., 436.

3. These facts, as shown by this record and as found by the trial court, defeat the plaintiff's right of recovery, whether the New York notice law is applicable to the policy or not; for "there is nothing in the New York statute (if controlling at all) to prevent the parties from dealing with that as with any other contract, and if they chose to abandon it their action is conclusive."

Mut. Life Ins. Co. *vs.* Phinney, 178 U. S., 328.
Mut. Life Ins. Co. *vs.* Sears, 178 U. S., 345.
Mut. Life Ins. Co. *vs.* Hill, 178 U. S., 347.
Mut. Life Ins. Co. *vs.* Allen, 178 U. S., 351.

Fourth Point.

If it were necessary to notify the insured that if he did not pay his premium when due this policy would be forfeited and void, then as matter of fact notice was duly sent.

1. The company gave Johnson notice of the maturity of the November, 1893, premium, which conformed to the notice law of New York passed in 1892 and in effect at the time of sending the notice.

2. If any New York notice law were applicable to this policy in the fall of 1893, it was the law of 1892 and not the law of 1877, as claimed by the plaintiff.

For convenience we shall here print these two laws together. They are as follows:

Law of 1877.

"Sec. 1. No life insurance company, doing business in the State of New York, shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever

any premium or interest due upon any such policy shall remain unpaid, when due, a written or printed notice, stating the amount of such premium, or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid by the company, or by an agent of such company, or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company, or to a duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice.

"*Provided, however*, That a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service hereinbefore provided for.

"SEC. 2. The affidavit of any one authorized by section one to mail such notice, that the same was duly addressed to the person whose life is assured by the policy, or to the assignee of the policy, if notice of the assignment has been given to the company in pursuance of said section, shall be presumptive evidence of such notice having been given" (pp. 6, 58).

LAW OF 1892.

"SEC. 92. No life-insurance corporation doing business in this State shall declare forfeited, or lapsed, any policy hereinafter issued or renewed, and not issued upon the payment

of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any policy be forfeited, or lapsed, by reason of non-payment when due of any premium, interest, or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice, stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.

"The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up policy as in this chapter provided.

"If the payment demanded by such notice shall be made within the time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed, until the expiration of thirty days after the mailing of such notice.

"The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given" (p. 12).

It will be noticed that substantially all the difference between these two acts is that by the proviso in the 1877 law the notice is required to be sent "at least *thirty* and not more than *sixty* days prior to the day when the premium is payable," and is required to state to the insured that unless the

premium then due shall be paid within thirty days after the mailing of such notice the policy and all payments thereon shall become forfeited and void, whereas the 1892 act provides that the notice must be sent "at least *fifteen* and not more than *forty-five* days prior to the day when the premium is payable," and must notify the insured that unless the premium shall be paid by or before the day it falls due the policy and all payments thereon shall become forfeited and void; "but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice."

3. The notice law of 1892 took effect October 1, 1892. The Johnson policy was renewed by the payment of that premium that became due November 11, 1892, and therefore, if any notice law applied to this policy, it was the 1892 law.

First. The Johnson policy was renewed by the payment of the premium that became due November 11, 1892.

(*a.*) The act of 1877 and the act of 1892 are each in terms made applicable to "any policy hereafter issued or *renewed*." The Johnson policy was renewed after the 1892 act went into effect, within the meaning of the word "renewed," as used in both laws.

The case of Carter *vs.* Brooklyn Life Ins. Co., 110 N. Y., 15, involved the single question of the meaning of this word "renewed" in the notice law of 1877.

In that case the annual premiums on a policy issued in 1870 were promptly paid down to October, 1883, "and upon non-receipt of the premium for that date the company declared the policy forfeited, and cancelled the policy on the books of the company. The plaintiff did not give the defendant either prior or subsequent notice of the time when such premium became due, or the place where payable, as provided by chapter 341, Laws of 1876, and amendment thereto

by chapter 321, Laws of 1877. * * * It is contended by the appellant that the act applies only to policies issued or renewed after its passage, and that the policy cannot be said to have been renewed unless it has become forfeited or lapsed and has been afterwards restored or reinstated by the company. * * *

"The payment and receipt by the company of each annual premium constituted a renewal of the policy within the meaning of the word renewed as used in the act."

This Carter case was decided in June, 1888. It was referred to as an authority for the decision of the case of Phelan *vs.* Insurance Co., 113 N. Y., 147. The reasoning of it was approved in the case of Baxter *vs.* Insurance Co., 119 N. Y., 450, and it stands today as the construction given to this word by the highest court of the State of New York.

(*b.*) This construction of the word "renewed" by the highest court of the State of New York will be followed and adopted by this court.

Elmendorff *vs.* Taylor, 10 Wheat., 151.
Cathcart *vs.* Robinson, 5 Pet., 264.
Douglas *vs.* County of Pike, 101 U. S., 677.
Louisiana *vs.* Pilsbury, 105 U. S., 278.
Chicago & A. R. R. *vs.* Wiggins Ferry Co., 119 U. S., 615.
First Nat'l Bk. of Humboldt, *vs.* Glass, 126 U. S., 159.

(*c.*) The judicial construction of the word "renewed" in the Carter case must have been satisfactory to the legislature of the State of New York, because, when, in 1892, it set about to compile the insurance laws of the State, it retained in this act of 1892 the word renewed, which had been so defined in the Carter case.

"The re-enactment of a statute, after a judicial construction of its meaning, is to be regarded as a legislative adoption of the statute as thus construed."

Tuxbury, appellant, &c., 67 Me., 297.
The Abbotsford, 98 U. S., 440.
Barlow *vs.* Teal, 15 Q. B. D., 403.
Commonwealth *vs.* Hartnett, 3 Gray, 450.
Whitcomb *vs.* Rood, 20 Vt., 49.
Ex parte Banks, 28 Alab., 28.

(*d.*) The plaintiff insists that the statute of 1877 was part of Johnson's policy. If this insistment is true, then we answer, the Carter case and the court's construction therein of the word "renewed" in this statute were also a part of Johnson's policy.

The decisions of the highest court of a State in construing its laws constitute, so far as contract obligations incurred under them are concerned, as much a part of the laws as if the decisions were embodied in the law. As Mr. Justice Field said in Louisiana *vs.* Pilsbury, 105 U. S., 278, at page 294:

"The construction, so far as contract obligations incurred under it are concerned, constitutes a part of the law as much as if embodied in it. So far does this doctrine extend that when a statute of two States, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own State and enforced in accordance with it in all cases arising under it (Christy *vs.* Bridgeon, 4 Wall., 196, and Shelby *vs.* Guy, 11 Wheat., 361). The statute, as thus expounded, determines the validity of all contracts under it. A subsequent change in the interpretation can affect only subsequent contracts."

In Douglas *vs.* County of Pike, 101 U. S., 677, Mr. Chief Justice Waite said:

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself."

Hence it follows that in view of the meaning of the word "renewed" in this notice law, as defined by the court of appeals of New York in the Carter case, and the binding force of that definition on other courts, and the conclusiveness and finality of that definition by reason of the fact that the word "renewed," after being so defined in the Carter case, was carried unchanged into the act of 1892, this Johnson policy was renewed by the payment of the November 11, 1892, premium

Second. If any notice law applied to this policy, it was the 1892 law. The slight changes made by the new law could not prevent this.

(*a.*) No one has a vested right in a law or a right to say that a law shall not be changed.

Roggematter *vs.* Railway Co., 41 Ia., 297.
Brady *vs.* Railroad Co., 57 Ia., 393.

(*b.*) The laws in force when a contract is made are subject to change, and if changed they apply as changed to contracts made under the old law, unless the change is of such a nature as materially to impair the obligation of the contract.

Hoffman *vs.* City of Quincy, 4 Wall., 535.
Edward *vs.* Kearsay, 96 U. S., 695.
Antoine *vs.* Greenhow, 107 U. S., 769.
Ceivert *vs.* Lewis, 122 U. S., 284.

(*c.*) This law of 1892 did not so change the former notice law as materially to impair the obligations of insurance contracts made under the old law and to which the old law applied.

A careful reading of the two statutes discloses that the notice to be sent under the law of 1877 was practically in form and substance the same as the notice to be sent under the law of 1892. The difference to be noticed in connection

with this case is the change in the time for sending the notice.

The 1877 act required the premium to be paid "thirty days after the mailing of such notice," or if the notice was sent before the premium became due, it was required to be sent "at least thirty and not more than sixty days prior to the day when the premium was payable." Thus this act of 1877 gave the insured thirty days from the mailing of the notice within which to pay the premium, in order to avoid the penalty of forfeiture.

The act of 1892 required the notice to be sent at least fifteen and not more than forty-five days prior to the day when the premium was payable. "And no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice." Thus this act of 1892 also gave the insured thirty days after the mailing of the notice within which to pay his premium. Therefore under the 1892 act the insured had precisely the same benefits that he had under the 1877 act.

(*d.*) This notice law is remedial in its nature, and, like any other remedial law, may be either changed or supplanted by a new law, provided the new law preserves a remedy substantially as good as existed under the old law. The law requires of the insurance company some affirmative act to make the forfeiture operative. It confers a remedy in favor of the insured against arbitrary forfeiture of his policy.

"All acts giving a right of action where none hitherto existed, or preserving or enforcing a right that has hitherto not obtained, or imposing a condition upon the termination of a right, are remedial."

Union Pacific Railroad *vs.* Debusk, 12 Col., 294.
Antoine *vs.* Greenhow, 107 U. S., 769.

The remedy under the law of 1892 is quite as adequate for the protection of the policy-holder as was the remedy

under the old law, and therefore it applies; for either the legal right or the legal remedy may be changed by changed or new laws, provided the change involves no impairment of a substantial right.

Bronson *vs.* Kenzie, 1 How., 310.
White *vs.* Hart, 13 Wall., 645.
Gunn *vs.* Barrie, 15 Wall., 610.
Butler *vs.* Palmer, 1 Hill., 324.
Walker *vs.* Whitehead, 16 Wall., 314.

Hence, when a law under which a contract was made has been repealed, and a new law substituted for it, the question as to whether or not the new law applies to contracts made under the old is controlled by the question as to whether or not the new law, in respect of the validity, construction, discharge, and enforcement of the contract, leaves the contract substantially as valuable to the parties as it was under the old law. If it does, then the new law applies to it and forms a part of it.

(*c*.) The act of 1892 may be treated as a continuation of the act of 1877 and not as a new enactment.

As already stated, the provisions of the two statutes are similar and almost identical. There never was a moment of time since the passage of the act of 1877 when the act was not substantially in force. The 1877 act was repealed by the act of 1892, but the 1892 act did not take effect until October 1, 1892, and so the 1877 act, which was in force until October 1, 1892, became the 1892 act on that day.

The act of 1892 was intended by the legislature as a continuation of such old laws as were substantially embodied in it. In section 282 of that act it was provided (p. 13) that "the provisions of this chapter, so far as they are substantially the same as those of laws existing on September 30th, 1892, shall be construed as a continuation of such laws,

modified or amended according to the language employed in this chapter, and not as new enactment."

Therefore what Mr. Justice Peckham said in Bear Lake Co. *vs.* Garland, 164 U. S., 1, a case to which we especially invite the attention of the court upon this point, is precisely applicable here: "Notwithstanding, therefore, this formal repeal, it is, as we think, entirely correct to say that the new act should be construed as a continuation of the old with the modifications continued in the new act."

Therefore, if any notice law were applicable to the Johnson policy, after the payment of the premium that matured November 11, 1892, and the conversion of the policy into an accumulation policy, it was the law of 1892, and not, as claimed by the plaintiff, the law of 1877.

D. But the point as to whether the notice law of 1877 or the notice law of 1892 should be applied to this policy has been precisely decided in the case of Rosenplanter *vs.* Provident Life Insurance Company, 91 Fed. Rep., 728, wherein it was held as follows:

"Laws N. Y. 1877, c. 321, providing that no policy of life insurance should be declared forfeited unless a prescribed notice should be served on the insured, did not become a part of the contracts created by policies subsequently written in the State, so that its repeal impaired the obligation of such contracts, but was merely a regulation for the government of insurance companies, belonging to the class of remedial statutes, which it is competent for the legislature to enact, repeal or amend, making the same applicable to existing contracts, without affecting the obligations of such contracts."

This decision was affirmed in the United States circuit court of appeals, 96 Fed. Rep., 721, wherein it was held that the laws of New York of the year 1877, chap. 631, providing that no life insurance company should declare a policy forfeited for non-payment of premiums until it had

given the statutory notice, did not become a part of the contract of insurance made while it was in force, and the repeal of such a statute was not an impairment of the obligations of the contract.

4. The company sent a notice which conformed to the 1892 notice law.

(*a.*) On the trial the evidence of the sending of this notice was as clear and convincing as the nature of the fact to be proven would admit. We think the proof of it was so persuasive that different minds could not reasonably draw different conclusions from it.

The undisputed evidence shows that on, or a few days before, the 16th day of October, 1893, the Johnson notice (called by the witnesses "renewal notice") of the maturity of his premium due November 11, 1893, was received at the office of G. A. Smith, manager of the defendant's office at Sioux City, Iowa (pp. 51, 92).

As soon as the renewal notice was received from the home office, Anna Phelps Smith and A. A. De Celle, employés in Smith's Sioux City office, "checked said renewal notices off with the policy register, * * * calling off first the number of the policy, then the name of the insured, his address, date due of the premium, and the amount of the premium. * * * I, (De Celle) called off said data from the renewal notice, she (Mrs. Smith) watched the register, and if she found that the said data, as I called it off, corresponded with the data on the policy register, she made a check-mark on the register. The purpose of making this check-mark was in order to prevent mistakes, and in order also to show that we had received the notice in the office for transmission. The check-mark in lead pencil, over the word returned on the registry of policy 385048, page 116 of the policy register, was made at the time that the notice was received for the premium due November 11th, 1893, after the same was called off to Mrs. Smith, and was made by her, and shows that said

notice was received at the office, and corresponded exactly as to name, address, amount of premium, date due of the premium and the number of the policy, with said policy register" (De Celle's testimony, p. 92; Mrs. Smith's testimony, p. 53).

The material portion of the record of the Johnson policy, contained in this policy register, was introduced in evidence as Exhibit 23, and was as follows:

Date of policy.	No. policy.	Insured.	Address.	Premium, date due.	How payable.	Amount of premium.
1890, Nov. 11.	385048	Johnson, Frank C.	Randolph, Ia.	11-11	Annually.	$1060

And in the last column it had a lead-pencil check-mark Mrs. Smith put there when she and Mr. De Celle compared the notice in question with the policy register in October, 1893 (p. 94).

When Mr. De Celle and Mrs. Smith had thus verified the correctness of the renewal notice they then passed it over "to Mrs. Wainand for the purpose of making out a list of the number of the policies and the amounts of the premiums," as shown in the notices (Mrs. Smith's testimony, p. 53; De Celle's testimony, p. 92). After Mrs. Wainand had finished making a list of the number of the policies and the amounts of the premiums from the renewal notices, she then passed them over to E. H. Kruger, whose desk was right beside hers, and whose duty it was to mail the notices (Mrs. Wainand's testimony, p. 50; Kruger's testimony, p. 46; De Celle's testimony, p. 92); and then Kruger "put on the envelope the address, Frank C. Johnson, Randolph, Iowa—put on the address of the insured, No. 385048, as appeared in the policy register at that time—and I addressed the envelope accordingly, and folded the notice, and put it into the envelope, and sealed the envelope, and put a two-cent stamp on the envelope, and delivered it at the post-office—deposited it in the mails at the post-office. I did this for the New York Life Insurance Company. The New York Life Insurance Company paid the postage, and I mailed this

notice on the 16th day of October, 1893" (Kruger's testimony, p. 47; De Celle's testimony, p. 92).

On the same day Kruger mailed this notice, or the next day, he made out, signed, and swore to an affidavit, pursuant to this statute, that the notice required by the notice law had been duly addressed and mailed on the 16th day of October, 1893. The affidavit is full and specific; it has attached to it a blank form of the notice sent, and a memorandum of the number of the policy and the amount of the premium, copied from the renewal notice (Exhibit 31, pp. 44, 45).

The evidence, therefore, of the sending of this notice is not merely *prima facie*, as shown by the affidavit of the clerk who sent it, but the *prima facie* case so made is supplemented by the undisputed testimony of four witnesses and by the records in the office of the company, all tracing this notice from the time it was filled out ready to be sent through the various stages of verification as to substance and form, its due preparation for the mails, mailing it, and preserving the evidence thereof.

(*b.*) What is there in this record to indicate that this notice was not mailed as thus proven? Nothing, absolutely nothing, except that the plaintiff testified that her husband was particular to save all papers, and—

"(By Mr. BREEN:)

"Q. Now, I repeat for the purpose of making up the record the question formerly asked you, of whether or not you made search among the papers of the deceased in an endeavor to find such a notice or letter?

"A. I did. A very thorough search. * * * But I did not find a notice such as the notice here in controversy or any other notice" (p. 69).

Now, the statute does not provide that the insured must receive the notice, nor does it require that the insured must preserve the notice after he does receive it. Mrs. Johnson

says she made a search, and volunteers to say that she made a "very thorough search." She does not say, however, where she searched. Johnson had his residence in Omaha, a business location at a bank in Omaha, and owned a bank in Randolph, Iowa, where he received mails. Mrs. Johnson does not say that she looked in any of these places for this notice, but the plaintiff is satisfied with this conclusion of hers, that she "made a thorough search," without stating as to where or when or how thoroughly she searched, except that the search was made after her husband's decease, which was about three years after this notice was sent.

Under these circumstances, therefore, it cannot be much, if any, evidence, that Kruger swore falsely in his affidavit made at the time he sent the notice, and that the defendant's witnesses, none of them at the time of testifying in defendant's employ except Mr. De Celle, were all mistaken, and that this notice was not sent, because Mrs. Johnson testified that she did not find it in a search she made three years after it had been sent. Johnson probably did not preserve the notice. It was not a paper such as he would be likely to preserve, or as men usually preserve. The most careful of us receive these notices, make a memorandum of the date of payment, then throw the notice into the waste-basket. Johnson had no interest in preserving this notice; his interest was not to preserve it. If, however, he might have preserved it if he had received it, Mrs. Johnson's testimony does not show that the search she made was such as that she would have found it. Her mere conclusion that she made a thorough search is not sufficient to prove that a paper was not in existence and among her husband's effects, which she had no interest in finding, but which, on the contrary, if she had found would, on the plaintiff's theory of this case, have cost her $25,000.

The evidence, therefore, is such as that it would probably have been erroneous to submit the case to the jury on the question as to whether or not this notice was duly sent, if that

point had been in the case; and a verdict against the defendant on that question might well have been set aside.

(*c.*) The notice that was sent fully conformed to the 1892 statute. A blank copy of it appears in Kruger's Exhibit 21 (p. 45), and also in Kruger's testimony (p. 47). We do not understand that any claim is made as to the form or substance of the notice.

(*d.*) The notice was sent to the proper address.

Plaintiff claims that because one of the defendant's agents in Omaha addressed a letter to Johnson in care of the Citizens' Bank of Omaha, in May, 1893, that for that reason Randolph, Iowa, was not Johnson's last known post-office address for the purposes of this policy. *But they do not claim that Randolph was not his post-office address in October*, 1893.

There would be something in this claim of the plaintiff if there had been any change in Johnson's business or residence location between the time that he applied for this policy and the time the notice was sent, in October, 1893. On this question, however, the plaintiff herself testified as follows (p. 68):

"We lived in Randolph, Iowa, before moving to Omaha. We moved to Omaha in the fall of 1889. My husband's business at Randolph was running a private bank. The name of the bank was Randolph bank. He was interested as owner of the bank, and continued to own that bank up to September, 1895, I think.

"Q. He received mail at the bank after he moved away, didn't he?

"A. Yes; his bank mail.

"Q. A letter addressed to Randolph would be drawn out by the bank, wouldn't it, and remain there until he came there and opened it, and transacted the business?

"A. Yes.

"Q. That he did all the time he had his bank there?

"A. Yes. * * *

"He retained the bank at Randolph, and went back and

forth to see how things were going once in a while—once a month, or something like that. * * * (p. 70). When we first moved to Omaha in 1889 we lived at 216 N. 22nd street, and that is where we resided up to my husband's death, and yet."

From this evidence it will be noticed that there was absolutely no change either in Johnson's residence or in his business address from 1889, when he moved to Omaha, down to 1895, when he sold his Randolph bank.

In his application for this policy it is stated (p. 35):

"2. (*a.*) Present residence: Between Randolph and Omaha, county of Fremont, State of Iowa.

"(*b.*) Post-office address: Omaha (California & 16th Sts.), county of Douglas, State of Neb., hereafter."

The application is dated December 18, 1890 (p. 39). At the time the policy was delivered to Johnson he expressed a desire to have the post-office address he had given the company in his application changed (p. 59), and so, on January 15, 1891, he wrote to the company the following letter (p. 56):

"COUNCIL BLUFFS, IOWA, *January* 15, 1891.

"The New York Life Insurance Company will please make the following corrections in an application for an insurance made by me, dated December 18, 1890, and upon which policy No. 385,048 was issued, and for which this shall be held as good and sufficient authority for the making of such corrections.

"The answer to the question No. 2 B should be read as follows:

"Randolph, Iowa, Fremont county.

"FRANK C. JOHNSON."

Now, clearly, if Randolph, Iowa, was Johnson's post-office address January 15, 1891, it was his address October 16, 1893. Between those dates Johnson had not changed either his residence or business location; both remained unchanged

from 1889 to September, 1895. Moreover, if Randolph, Iowa, was not Johnson's post-office address January 15, 1891, the plaintiff is in no position to say so here, because that was the address he gave the company for the purposes of his policy, and it was perfectly competent for him to agree upon whatever address he chose with the company as his post-office address.

Carter *vs.* Insurance Co., 110 N. Y., 15.

And that address would continue to be his post-office address either until he notified the defendant to change it or until his business or residence location changed from what it was when he designated that as his address to some other post-office address and knowledge of the changed address was brought home to the company.

As a matter of fact, from this evidence Johnson had two post-office addresses—one at Omaha and one at Randolph—from the time he first moved to Omaha, in 1889, until he sold his Randolph bank, in 1895; and so when the company sent this notice to that one of his two post-office addresses that he gave it as his address, the company not only sent it to his post-office address, but sent it to his proper post-office address, his last known post-office address, as between him and the company.

In his contract with the defendant, Johnson agreed to treat the sending of a notice "as an act of courtesy only." But whether it is considered an act of courtesy or a wise and proper precautionary measure, such as every careful lawyer would advise, or a mere matter of convenience, in view of the multiplicity of the defendant's policy-holders and the variety of its policy contracts, the important fact remains that notice was sent, and that as sent it conformed in substance and form, in time and manner of sending, to the notice spoken of in the New York laws. So that if the notice law has anything to do with the case the decision of the Iowa

court was right, just the same, and ought not to be disturbed.

Whether, therefore, this contract be construed, as the Iowa court construed it, to be a non-forfeitable policy, which in case of non-payment of premium could not be avoided, but would stand as a valid contract of insurance for a specific term, or whether it be construed as a special form of policy, to which it was not intended the New York notice law should apply, and in which the agreement of waiver of notice that the parties made would be valid and binding, or whether it be treated as a forfeitable life contract, existing at any and all events until it should become a valid claim by death, unless sooner forfeited for non-payment of premium after sending the statutory notice, in any one of these views the result here is the same—when Johnson died he had no policy with the defendant.

Respectfully submitted.

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30 OCTOBER, 1902.

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